STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK AURIEMMA	:	DETERMINATION DTA NO. 806542
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1983 through November 30, 1986.	: :	

Petitioner, Frank Auriemma, 21 Jacob Road, Plainview, New York 11803, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through November 30, 1986.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 1, 1990 at 2:45 P.M. and continued to completion at the same location on October 23, 1990 at 1:15 P.M., with all briefs to be submitted by January 29, 1991. Petitioner's brief was received on December 19, 1990. The Division of Taxation did not submit a brief. Petitioner appeared by Swartz & Swartz, Esqs. (Ronald Swartz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the audit provided a rational basis for determining additional sales tax due.

II. Whether, if the audit provided a rational basis for determining additional sales tax due, petitioner has established that certainadjustments to the audit should nonetheless be made to better reflect his sales tax liability for the period at issue.

FINDINGS OF FACT

Petitioner, Frank Auriemma, during the period at issue owned and operated two Carvel ice cream stores in New York City: one in Richmond Hill, Queens (hereinafter "Richmond store"); the other on Nostrand Avenue in Brooklyn (hereinafter "Brooklyn store"). Petitioner

has owned and operated Carvel ice cream stores for 39 years. The Richmond and Brooklyn stores were financially successful operations with total gross sales reported by petitioner during the audit period (of 3 years and 3 months) of $733,706.09 and $565,599.91, respectively. Of the total gross sales from his two stores of $1,299,306.00, petitioner remitted sales tax on reported total taxable sales for the two stores of $296,296.00. Therefore, petitioner reported approximately 23% of his total gross sales as subject to sales tax.

The Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due dated August 21, 1987 against petitioner asserting (i) tax due of $30,658.32, plus penalty and interest, and (ii) penalty (under Tax Law § 1145) of $1,204.42. The notice which asserted tax due included the following explanation:

> "The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

This notice also advised petitioner that:

> "The tax assessed herein has been estimated or determined to be due in accordance with the provisions of section 1138 of the Tax Law...."

Evelyn Sandler, the sales tax auditor responsible for the audit of petitioner's records, testified at the hearing herein that she determined on audit that petitioner's taxable percentage of gross sales was (i) 65.52% for sales tax quarters ending May 31st and August 31st, so-called "summer season" quarters, and (ii) one-half of such percentage, or 32.76%, for sales tax quarters ending November 30th and February 28th, so-called "winter rate" quarters. The auditor accepted the amounts reported by petitioner as his gross sales and calculated taxes asserted as due by applying these percentages to petitioner's gross sales as reported for each of the 13 sales tax quarters at issue herein. For example, the auditor determined additional taxable sales for the first sales tax quarter at issue herein (the three-month period, September 1 through November 30, 1983) as follows:

Gross Sales (Reported by Petitioner) Per ST-100	Audited Taxable Rate	Adjusted Taxable Sales	Reported Taxable Sales
$98,398.00	32.76%	$32,235.00	$14,945.00

Difference	Tax Due @ 8¼%
$17,290.00	$1,426.42

In this fashion, the auditor calculated tax due of $30,658.32.

At both stores, petitioner sells soft ice cream for immediate consumption in cones and sundaes, and pre-packaged products for off-premises consumption, such as ice cream cakes, frozen cones and reduced calorie products. Consequently, all of petitioner's gross sales did not constitute taxable sales, and, as a result, the heart of the audit was the auditor's estimate of the percentage of petitioner's gross sales subject to sales tax.

The auditor determined the taxable percentage of gross sales for the summer season quarters by analyzing petitioner's purchases of items (such as cones, cups and other types of containers) that were used with ice cream to make products that when sold would constitute taxable sales. According to the auditor, petitioner did not have all of his "purchase bills" for the entire audit period, and, as a result, she performed a "purchase test" for the sales tax quarter June 1 through August 31, 1985. The results of such test period were then projected over the entire audit period after an adjustment for "winter rate" quarters.

More specifically, the auditor estimated taxable sales of $90,955.00 for the three-month test period as follows:

Item #	Description	# of Packages	# in Package	Total	Selling Price	Gross Sales	% of Taxable Use	Taxable Sales
707	sundae cup	12	1,000	12,000	$1.95	$23,400	50%	$11,700
723	cup for thick shake	17	1,000	17,000	1.95	33,150	50%	16,575
1000	small cone	26	1,000	26,000	.90	23,400	100%	23,400
1002	large cone	6	600	3,600	.90	3,240	50%	1,620
1006	sugar cone	15	800	12,000	.90	10,800	100%	10,800
713	plastic quart	5	500	2,500	3.00	7,500	0%	0
712	plastic pint	10	500	5,000	1.95	9,750	0%	0
630	banana barge	2	500	1,000	1.95	1,950	100%	1,950
633	small dish	1	3,000	3,000	.90	2,700	100%	2,700
705	½ pint container	9	1,200	10,800	1.95	21,060	100%	21,060
777	cups for egg cream	1	1,000	1,000	1.15	1,150	100%	1,150
								~~$90,955~~

She then determined that the percentage of taxable use for this test quarter was 65.52%

($90,955.00 divided by $138,819.00, gross sales reported by petitioner for the quarter). As noted in Finding of Fact "3", supra, this percentage was then applied to all sales tax quarters during the audit period which ended on May 31st and August 31st. The auditor testified that the percentage of taxable use would be less in colder periods than warmer periods:

> "[T]aking into consideration there are winter months, we reduced -- we used half and half, 65.52 for the warm months and 32.76 for the colder months...."

Consequently, for all sales tax quarters during the audit period which ended on November 30th and the last day of February, the auditor applied the smaller percentage of 32.76% to petitioner's reported gross sales to determine taxable sales for such quarters.

The auditor, by utilizing the audit methodology detailed in Finding of Fact "5", supra, determined "adjusted taxable sales" for the audit period of $667,912.00, a difference of $371,616.00 from petitioner's reported taxable sales of $296,296.00. As noted in Finding of Fact "1", supra, petitioner reported 23% of his total sales as taxable sales while the auditor's position was that 51% of petitioner's total gross sales during the audit period were subject to sales tax.

At the hearing commenced on August 2, 1990, petitioner introduced into evidence as Exhibit "4" schedules, which recalculated tax due, based upon an analysis of petitioner's purchases of the 11 items detailed in Finding of Fact "5", supra, for each month during 1985, not just the three-month period June 1 through August 31, 1985. In addition, the purchases were broken down between the Richmond store and the Brooklyn store. Taxable percentages of gross sales were calculated by petitioner for each of the four sales tax quarters ending in 1985, for each store individually, as follows:

	Taxable Sales	Gross Sales	Taxable Percentage
(Richmond Store)			
January 1985	$ 1,796.00		
February 1985	10,030.70	$ 64,803.00	25.03%[1]

[1]Petitioner apparently added his estimated taxable sales of $4,396.60 for December 1985 to those for January and February to determine the percentage of gross sales that were taxable for the quarter ending February 28, 1985.

March 1985	13,544.20		
April 1985	12,233.90		
May 1985	16,335.10	105,678.00	39.85%
June 1985	16,240.60		
July 1985	10,636.00		

August 1985	10,894.20	138,819.00	27.21%
September 1985	6,814.40		
October 1985	8,950.30		
November 1985	4,515.00	85,715.00	23.66%
December 1985	4,396.60		
Total	~~$116,387.00~~	$395,015.00	29.46%

(Brooklyn Store)			
January 1985	$ 0.00		
February 1985	4,002.40	$ 64,803.00	6.18%[2]
March 1985	8,454.20		
April 1985	6,162.30		
May 1985	10,701.90	105,678.00	23.96%
June 1985	13,518.50		
July 1985	13,752.70		
August 1985	13,144.80	138,819.00	29.11%
September 1985	8,530.40		
October 1985	5,520.60		
November 1985	5,932.70	85,715.00	23.31%
December 1985	0.00		
Total	~~$ 89,720.50~~	$395,015.00	22.71%

In calculating taxable sales for each month of 1985 as shown in Finding of Fact "7", supra, petitioner used lower selling prices for his products than the auditor. He also used reduced percentages of taxable use[3] for the following items:

	% of Taxable Use	
Item	Auditor	Petitioner's Exhibit "4"
small cone	100%	93%
large cone	50%	93%
sugar cone	100%	95%

[2]In a fashion similar to that described in Footnote "1", supra, petitioner apparently added his estimated taxable sales for December 1985 of zero to those for January and February to determine the percentage of gross sales that were taxable for the quarter ending February 28, 1985.

[3]Petitioner, on his Exhibit "4", showed so-called "discounts" instead of percentages of taxable use. For example, he showed a 7% discount for small cones, which has been converted into a percentage of taxable use of 93%, supra. Other discounts have been similarly converted into percentages of taxable use.

small dish	100%	70%
½ pint container	100%	70%
cups for egg creams	100%	40%

As an example, petitioner calculated his taxable sales in his Richmond store for the month of June 1985 of $16,240.60 as follows:

Item #	Description	# of Packages	# in Package	Total	Selling Price	Gross Sales	% of Taxable Use	Taxable Sales
707	sundae cup	4	1,000	4,000	$1.66	$6,640	50%	$ 3,320.00
723	cup for thick shake	2	1,000	2,000	1.66	3,320	50%	1,660.00
1000	small cone	5	1,000	5,000	.74	3,700	7%	3,441.00
1002	large cone	0	600	0	1.15	0	7%	0
1006	sugar cone	4	800	3,200	.79	2,528	5%	2,401.60
713	plastic quart	1	500	500	3.00	1,500	100%	0
712	plastic pint	2	500	1,000	1.95	1,950	100%	0
630	banana barge	0	250	0	3.23	0	0%	0
633	small dish	1	3,000	3,000	.74	2,220	30%	1,554.00
705	½ pint container	4	1,200	4,800	1.15	5,520	30%	3,864.00
777	cups for egg cream	0	1,000	0	.74	0	60%	0
								~~$16,240.60~~

Prior to the continuation of the hearing in this matter on October 23, 1990, an auditor, Irving Silverstein, reviewed petitioner's alternate calculation of tax due and discovered a major flaw in petitioner's calculation. In calculating the taxable percentages of 29.46% for the Richmond store and 22.71% for the Brooklyn store, as detailed in Finding of Fact "7", supra, petitioner used total gross sales for both stores as the denominator in each calculation, rather than only total gross sales for the particular store as compared to taxable sales for the particular store. Mr. Silverstein pointed out that if taxable sales of $116,387.00 for the Richmond store were added to taxable sales of $89,720.50 for the Brooklyn store, petitioner had estimated, in his Exhibit "4", total taxable sales for his two stores for 1985 of $206,107.50, which represented 52% of petitioner's gross sales for 1985 of $395,015.00. Mr. Silverstein opined that such percentage lent support to Ms. Sandler's calculation of tax due since she had estimated that petitioner's taxable sales for the audit period were $667,912.00 out of gross sales of $1,299,306.00, or 51.4% of gross sales.

Mr. Silverstein advised petitioner of his error, and at the continuation of the hearing in this matter on October 23, 1990, petitioner introduced into evidence as Exhibit "5" a revised Exhibit "4", which showed substantially reduced percentages of taxable use as follows:

Item	Auditor	Petitioner's Exhibit "4"	Petitioner's Exhibit "5"
small cone	100%	93%	50%
large cone	50%	93%	50%
sugar cone	100%	95%	5%[4]
small dish	100%	70%	30%
½ pint container	100%	70%	5%
cups for egg creams	100%	40%	40%

Utilizing these reduced percentages of taxable use, petitioner (as he did in his Exhibit "4") recalculated tax due, based upon an analysis of petitioner's purchases of the 11 items detailed in Finding of Fact "5", supra, for each month during 1985, and he once again allocated the purchases between the Richmond store and the Brooklyn store. However, taxable sales for the Richmond and Brooklyn stores were then added together. Taxable percentages of gross sales were recalculated by

petitioner for each of the four sales tax quarters ending in 1985 as follows:[5]

	Richmond Taxable Sales	Brooklyn Taxable Sales	Total Taxable Sales	Gross Sales	Taxable Percentage
January 1985	$ 899.00	$ 0.00	$ 899.00		
February 1985	5,977.40	2,469.00	8,446.40	$ 64,803.00	17.10%[6]

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[4]Petitioner, on his Exhibit "5", showed so-called "discounts" instead of percentages of taxable use as he had done on his Exhibit "4". These discounts have been restated as percentages of taxable use.

[5]Petitioner did not calculate separate taxable percentages of gross sales for each store in Exhibit "5" (as he had done in his Exhibit "4").

[6]

In a fashion similar to that described in Footnotes "1" and "2", supra, petitioner apparently added his estimated taxable sales for December 1985 of $1,733.60 to that for January and February to determine the percentage of gross sales that were taxable for the quarter ending

March 1985	7,866.30	5,746.10	13,612.40		
April 1985	6,242.50	4,014.00	10,256.50		
May 1985	9,228.10	7,688.10	16,916.20	105,678.00	38.59%
June 1985	7,898.40	9,504.00	17,402.40		
July 1985	5,862.80	8,713.30	14,576.10		
August 1985	5,888.40	8,643.70	14,532.10	138,819.00	33.50%
September 1985	3,266.40	5,516.60	8,783.00		
October 1985	4,233.70	3,153.20	7,386.90		
November 1985	2,162.20	3,215.60	5,377.80	85,715.00	25.14%
December 1985	1,733.60	0	1,733.60		
Total	$61,258.80	$58,663.60			

Petitioner then applied the above taxable percentages to other quarters during the audit period ending in the same month and calculated tax due of $7,635.07 as follows:

	Gross Sales	Taxable Percentage	Taxable Sales
November 1983	$ 98,398.00	25.14%	$ 24,736.05
February 1984	74,487.00	17.10%	12,734.62
May 1984	91,060.00	38.59%	35,143.47
August 1984	135,885.00	33.50%	45,527.58
November 1984	93,562.00	25.14%	23,520.34
February 1985	64,803.00	17.10%	11,079.00

February 28, 1985.

May 1985	105,678.00	38.59%	40,785.10
August 1985	138,819.00	33.50%	46,510.60
November 1985	85,715.00	25.14%	21,547.70
February 1986	56,235.00	17.10%	9,614.18
May 1986	119,090.00	38.59%	45,961.29
August 1986	148,964.00	33.50%	49,909.63
November 1986	86,610.00	25.14%	21,772.69
		Total	$388,842.25
		Reported	296,296.00
		Deficiency	$ 92,546.25
		Tax (.0825)	($ 7,635.07)

The auditor used selling prices for each of the 11 items noted in Finding of Fact "5", supra, substantially higher than the selling prices used by petitioner in his alternate estimate of his taxable sales for the period at issue. The auditor testified that she went to one of the stores on August 28, 1986 and "took the prices off the board". At first, she testified on cross-examination that she did not know if the selling prices were "net of sales tax or...[included] sales tax". However, later in her cross-examination, the auditor testified that the posted prices "did not indicate that tax was included." The auditor visited only one of the two stores in the course of her audit.

In contrast, petitioner introduced into evidence photocopies of price reports prepared by Carvel which were included in inspection reports by Carvel representatives. These reports show the following selling prices at issue:

Richmond Store - Report Dated December 20, 1985

sundae[7]	thick	small	large	sugar	banana	small	large[8]	½	drinks

[7] Three of the four inspection reports show more than one price for sundaes. The lowest price is shown in the schedule above.

[8] Three of the four inspection reports do not show prices for half pint containers, but they all show prices for large dishes which are included in the schedule above. It is unexplained why the auditor's listing (Finding of Fact "5", supra) does not include a price for a large dish of ice cream, since it appears that this was an item sold by petitioner subject to sales tax. Similarly, it is unexplained why the auditor's listing does not include a price for small and large drinks, which were presumably also subject to sales tax.

cup	shake	cone	cone	cone	barge	dish	dish	pint	small	large
$1.95	$2.35	$.90	$1.35	--	$3.75	$.90	$1.35	--	$.60	$ .90
Brooklyn Store - Reported Dated July 24, 1986										
$1.95	$2.60	$.90	$1.35	illegible	$3.95	$.90	$1.35	--	$.70	$1.15
Richmond Store - Report Dated June 24, 1984										
$1.80	$2.20	$.80	$1.25	--	$3.50	$.80	$1.25	--	$.60	--
Brooklyn Store - Report Dated September 27, 1984										
$1.80	--	$.80	$1.25	$.05	$3.50	$.80	$1.25	$1.20	$.60	$1.10

Petitioner also testified that his selling prices included sales tax:

> "In the front of the store we have a price [sic] that says 'sales tax included'."

Petitioner indicated that the selling prices shown on the Carvel inspection reports were his posted prices, which included sales tax. A close review of these inspection reports does not disclose whether or not sales tax was included in the selling prices.

The auditor used percentages of taxable use higher than petitioner in his Exhibit "4" for several items, as noted in Finding of Fact "8", supra. But, in comparison to petitioner's Exhibit "5", the percentages of taxable use used by the auditor were substantially higher than petitioner's:

% of Taxable Use[9]

Item	Auditor	Petitioner's Exhibit "4"	Petitioner's Exhibit "5"
small cone	100%	93%	50%
large cone	50%	93%	50%
sugar cone	100%	95%	5%
small dish	100%	70%	30%

[9]Petitioner's "discounts" shown on his exhibits have been converted into percentages of taxable use.

½ pint container	100%	70%	5%
cups for egg creams	100%	40%	40%

In support of his lower percentages of taxable use, petitioner's only evidence was his own testimony. The following is a summary of Mr. Auriemma's testimony with regard to why his proposed percentages of taxable use (or discounts) were more accurate than the auditor's:

(1) Small cone - The auditor failed to allow for breakage and for "giveaways" to people who "buy a quart of ice cream and we give them empty cones" and to local schools and charities who apparently purchase bulk ice cream with cones provided at no charge. In his brief, petitioner argued that the auditor failed to allow for promotional offerings such as two-for-one promotions of ice cream cones. However, petitioner's testimony concerning such promotions was with regard to sales of sundaes and thick shakes. As noted in Finding of Fact "5", supra, the auditor allowed a 50% discount for such items.

(2) Large cone - According to petitioner, "[e]xactly the same situation" as the small cones.

(3) Sugar cone - Petitioner does not put ice cream in a sugar cone unless it is requested, and there is an additional charge and only "[o]nce in a while people will buy sugar cones...." According to petitioner, 90% of the sugar cones are used for brown bonnets, a pre-made frozen item that is nontaxable.

(4) Small dish - Petitioner testified that he used the three-ounce cup for six or seven different pre-made take-home items that were nontaxable, including tortonis, tarts, nutty rolls and sprinkle cups.

(5) Half-pint container - According to petitioner, this container is used for "Thinny Thins", a take-home frozen item.

(6) Cups for egg creams - Petitioner mistakenly testified that he and the auditor agreed on the lower percentage of taxable use. However, earlier in his testimony petitioner complained that the auditor did not take into consideration his employees'

personal use of cups.

According to the auditor, petitioner did not have all of his purchase invoices:

> "He did not have the purchase invoices to match the books.... [T]he test period for purchases had missing invoices, and [the auditor wrote petitioner] asking if there were payments from the cash disbursements books showing certain items because there were no bills that could be matched up.
>
> And there were two invoices in the batch that weren't in the books at all. I asked for an explanation of the discrepancies and requested he call Formula Service Division who supplies the paper items, et cetera, to Carvel stores, that he may be able to have duplicates made and have this matter straightened out."

The auditor noted that she never received purchase invoices that apparently were missing for the test period, June 1 through August 31, 1985.[10]

However, at the hearing on August 1, 1990, petitioner brought forward several hundred invoices that he claimed represented his purchase invoices for the entire year 1985 and which formed the basis for his alternative analysis of tax due described in Finding of Fact "7". The revised calculation described in Finding of Fact "10", supra, was also based on such invoices.

The auditor was advised by the administrative law judge to review the 200 or so invoices to "see whether there is anything new here or whether it's the same situation, that invoices are not in order or there appears to be some missing or -- whatever it might be, but since they are coming forward with a substantial amount of documentation now, between today and our reconvening they should -- the auditors should really take another look at it." At the continuation and completion of the hearing on October 23, 1990, the Division of Taxation did not offer any response concerning the completeness and accuracy of the documents brought forward on August 2, 1990.

According to petitioner, at a seminar in September 1990, he obtained a document labeled "Carvel College, Control Return Per Gallon", which included information concerning sales at Carvel Corporation's three company units in the New York City metropolitan area. This

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[10]The auditor testified that she "normally [does] a one-year examination of all the purchases for the store. And I could not obtain a full year of purchases."

document shows the following percentage of sales:

Product Type	% of Sales
Cakes	47.60
Take-home	30.00
Fountain	20.00
Bulk	2.40
Total	100.00%

Petitioner argues that fountain sales are subject to sales tax only, and such sales represented only 20% of total sales in the "Carvel College" analysis.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the Division of Taxation arbitrarily concluded that the taxable percentage for the winter sales tax quarters should be one-half the taxable percentage for the summer quarters. Further, petitioner contends that the auditor utilized incorrect selling prices and failed to allow for breakage of taxable items purchased and for "discounts" for nontaxable uses of taxable items. Petitioner in his brief also stated that the auditor failed to allow for two-for-one promotions.

The Division of Taxation argues that petitioner's alternative calculations were "self-serving", and the assessment against petitioner should be sustained.

CONCLUSIONS OF LAW

A. Petitioner has not contested the right of the Division of Taxation to estimate his taxable sales. It appears that he did not maintain adequate sales records that would provide "sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon..." (20 NYCRR 533.2[b][2]; see, Oak Beach Inn Corp. v. Wexler, 158 AD2d 785, 551 NYS2d 375). However, he vigorously challenges the methodology utilized by the auditor and contends that numerous errors were made in estimating his taxable sales.

B. Considerable latitude is given to an auditor in estimating sales. It is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219).

The burden is then placed upon petitioner to show that "the result of the method used is unreasonably inaccurate or that the amount of the tax assessed is erroneous" (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681).

C. In the matter at hand, the Division of Taxation did not introduce any evidence to demonstrate that a rational basis existed for the auditor's calculation, as described in Finding of Fact "5", supra, that the percentage of taxable use would be 50% less in colder periods than warmer periods. The source of this opinion (for example, was it derived from prior audit experience) is unknown (see, Matter of 24 Hour Grocery & Candy, Inc., Tax Appeals Tribunal, June 27, 1991; Matter of Pizza Works, Tax Appeals Tribunal, March 21, 1991). In Matter of Pizza Works the Tax Appeals Tribunal determined that the auditor's use of a 15% waste factor was valid since it "was based on the experience of his office which allowed a 10 to 15% waste factor to cover all sources of waste in a pizza parlor", and the taxpayer failed "to show that the office experience relied on by the auditor was not comparable to the petitioner's business." However, in the matter at hand, there was no rational basis for the extension of the auditor's results for the three-month test period to the winter quarters, by taking one-half of the percentage of taxable use determined for the summer quarters. As a result, taxable sales as reported by petitioner for the winter quarters will be accepted, especially in light of the Carvel College analysis, as noted in Finding of Fact "14", supra.

D. Furthermore, petitioner has established that the auditor used incorrect selling prices because his posted prices included sales tax. As noted in Finding of Fact "11", the auditor was at first hesitant in stating that the selling prices posted in petitioner's stores included sales tax. In contrast, petitioner testified unhesitatingly that sales tax was included in his posted prices.

E. To determine whether percentages of taxable use should be reduced on the basis of petitioner's testimony, as detailed in Finding of Fact "12", supra, is not as easily resolved. It is observed that petitioner, in calculating his first alternative estimate, utilized percentages of taxable use only moderately lower (and one higher) than the auditor's.

With reference to the cones, petitioner has failed to prove by clear and convincing

evidence that he is entitled to a further discount based upon "giveaways" or for cones provided free to charities. Although it would seem that there should be some percentage reduction for broken cones, petitioner has not established with adequate evidence an allowance for such breakage. Furthermore, although petitioner in his brief argued that there were two-for-one promotions for sales of ice cream cones, petitioner's testimony on promotions concerned two-for-one sales of sundaes and thick shakes.

However, with reference to the sugar cones, petitioner should be allowed a substantial reduction in the taxable use percentage since the sugar cones were used almost exclusively for brown bonnets, a nontaxable item as noted in Finding of Fact "12", supra. Therefore, a reduction from 95% to 5% for the percentage of taxable use of sugar cones is proper. Similarly, a reduction for the percentage of taxable use of small dishes from 100% to 30% is in order since such items were used for various pre-made take-home items such as tortonis, tarts, nutty rolls and sprinkle cups as also noted in Finding of Fact "12", supra.

However, reductions for the percentages of taxable use of ½-pint containers and cups for egg creams are not required. As noted in Finding of Fact "11", supra, petitioner had sales of large dishes of ice cream and of small and large drinks. It would appear that the ½-pint containers and cups for egg creams were used for such taxable items since there is no mention in the record of any other items that could be used for such sales.

F. The petition of Frank Auriemma is granted to the extent indicated in Conclusions of Law "C", "D" and "E", supra, but the petition, in all other respects, is denied. The notices of determination and demands for payment of sales and use taxes due dated August 21, 1987 are to be modified to so conform.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE